

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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STUDENTS FOR FAIR *
ADMISSIONS, INC., *
Plaintiff, *

vs. *

CIVIL ACTION
No. 14-14176-ADB

PRESIDENT AND FELLOWS OF *
HARVARD COLLEGE, et al, *
Defendants. *

* * * * *

BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT JUDGE
STATUS CONFERENCE

A P P E A R A N C E S

CONSOVOY MCCARTHY PARK PLLC
Ten Post Office Square, 8th Floor
Boston, Massachusetts 02109
for the plaintiff
By: Patrick Strawbridge, Esq.

CONSOVOY MCCARTHY PARK PLLC
3 Columbus Circle, 15th Floor
New York, New York 10024
for the plaintiff
By: Michael H. Park, Esq.

Courtroom No. 17
John J. Moakley Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
January 28, 2016
10:00 a.m.

APPEARANCES CONTINUED

BURNS & LEVINSON LLP
One Citizens Plaza, Suite 1100
Providence, Rhode Island 02903
for the plaintiff
By: Benjamin C. Caldwell, Esq.

WILMER CUTLER PICKERING HALE and DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
for the defendants
By: Seth P. Waxman, Esq.

WILMER CUTLER PICKERING HALE and DORR LLP (Bos)
60 State Street
Boston, Massachusetts 02109
for the defendants
By: Felicia H. Ellsworth, Esq.

ALSO PRESENT: Ara Gershengorn, Esq., Harvard Office of
General Counsel

CAROL LYNN SCOTT, CSR, RMR
Official Court Reporter
One Courthouse Way, Suite 7204
Boston, Massachusetts 02210
(617) 330-1377

P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Hi, Everyone.

VOICES: Good morning, Your Honor.

THE CLERK: Court is in session. Please be seated.

This is civil action 14-14176, *Students for Fair Admissions versus President and Fellows of Harvard College*.

Will counsel identify themselves for the record.

MR. STRAWBRIDGE: Yes, on behalf of the plaintiff Students for Fair Admissions, Patrick Strawbridge, Consovoy McCarthy Park. I'm here with my colleague Michael Park and my co-counsel Benjamin Caldwell.

MS. ELLSWORTH: Good morning, Your Honor. On behalf of defendant Harvard Felicia Ellsworth. I'm here with my partner Seth Waxman and Ara Gershengorn from Harvard's Office of University Counsel.

THE COURT: So the intervenors are not represented here today, the aspirational intervenors?

MR. WAXMAN: Probably preparing their cert petition.

THE COURT: All that fighting and then they choose not to show up.

All right. So we were here initially as sort of a conference to follow up on the Court of Appeals' opinion on

1 the motion to intervene and I had both of your, you both
2 submitted sort of memos at my request and your suggestions
3 about what we could do while *Fisher* was still pending. And
4 then in the meantime on the 27th I got a letter from SFFA
5 and later that same day the letter from Harvard.

6 So I take Harvard's point that they would have
7 liked more time to respond to this. On the other hand, I am
8 a big proponent of sort of letters rather than motion
9 practice where we can try to resolve some of these issues
10 short of taking the time and the money to do this in a
11 motion.

12 The way this one is teed up, I mean, it is just
13 hard to see what is going on with all the redactions in the
14 attachment. I can't, I mean, I take the general point but I
15 don't really know what we are talking about so --

16 **MR. CALDWELL:** If I may, Your Honor?

17 **THE COURT:** Yes.

18 **MR. CALDWELL:** An unredacted version of the
19 letter was submitted yesterday morning along with the motion
20 to impound. It was --

21 **THE COURT:** I don't think so.

22 **THE CLERK:** I didn't get it but --

23 **THE COURT:** I got the motion to impound but
24 there wasn't anything attached.

25 **MR. CALDWELL:** There should have been a sealed

1 letter, a sealed envelope attached to that motion. I can
2 check --

3 **THE COURT:** Normally, I mean, normally when
4 somebody files a motion to impound and the thing is attached
5 I can look at the attachment and then once I grant the
6 motion it is to be refiled but I have, I generally can look
7 at the one that is attached to the motion to impound even
8 before the refiling. But in this case there hasn't been one
9 refiled and there wasn't one attached.

10 Now, if you are saying that you sent it in a
11 separate envelope, those never come to me and Karen said she
12 didn't get that one either. So it is fine --

13 **MR. STRAWBRIDGE:** Your Honor, if it helps, I
14 have an unredacted version.

15 **THE COURT:** That would be great.

16 **MR. STRAWBRIDGE:** I'm happy to hand that up.

17 (Whereupon, the document was handed to the Court.)

18 **THE COURT:** So where I would propose we start,
19 I am just sort of figuring out what we can do while *Fisher*
20 is still chugging along and I have my tentative thoughts on
21 it, tentative thoughts that I am sure are going to make
22 everybody equally unhappy, but I am going to throw them out
23 there and you can talk about what people think about it,
24 make your arguments and then I will go ahead and order what
25 I will.

1 I would like to get as much done as possible, as
2 you all probably know by now, I have been pretty consistent
3 in that, while at the same time not, keeping in mind that
4 *Fisher* is out there and not wanting anybody to do too much
5 of anything that *Fisher* might actually impact. So my
6 thoughts, and it's fairly in line with Harvard's fallback
7 position, I would like to do the discovery on the standing
8 issues in a limited sort of way. I would like Harvard to
9 respond to SFFA's Request for Productions 16, 18, 27 and 31.
10 And I would like to the extent possible all of the discovery
11 disputes and sort of foundational work to get done, Bates
12 ranges, custodian search terms, just sort of get, have the
13 parameters set so that when *Fisher* is decided we can jump
14 right back into this.

15 All right. You know, as I say, I don't want to
16 jackpot *Fisher* but I don't really have any confidence that
17 *Fisher* is going to move this case either. So I really want
18 us to tee it up to get going right after *Fisher* is decided.

19 And then SFFA had asked for regular discovery
20 conferences and I am happy to do that as well.

21 And, again, Harvard in their submission regarding
22 the scope of discovery was sort of more specific than SFFA's
23 was but I am guessing the only thing that SFFA is going to
24 have an issue with in what I just said is the standing
25 discovery.

1 **MR. STRAWBRIDGE:** Would you like me to address
2 it, Your Honor?

3 **THE COURT:** I am happy to have you talk about
4 it but I know you think it is unbalanced that you should
5 have to be providing information and they don't but in the
6 meantime they're -- and we will get to this -- but they are,
7 they're producing on their database and the production
8 burden has been on them so far.

9 And I really do view standing as just a threshold
10 jurisdictional issue that is going to have to get dealt with
11 and I don't see any reason not to deal with it now.

12 **MR. STRAWBRIDGE:** So, if I may, Your Honor?

13 **THE COURT:** You may.

14 **MR. STRAWBRIDGE:** All right. You know, SFFA's
15 proposal did not object to the notion of standing discovery
16 proceeding forward. What we have a bigger problem with is
17 the notion that discovery somehow is going to be layered or
18 sequenced in a way that's going to basically permit Harvard
19 all discovery at once to file a dispositive motion on
20 standing while keeping really the meat of the case away from
21 Students for Fair Admissions. In particular --

22 **THE COURT:** Well, why should we get to the
23 meat of the case if there is no standing?

24 **MR. STRAWBRIDGE:** Well, first of all, I'll say
25 this. In almost every single case involving affirmative

1 action that has gone up to the Supreme Court starting with
2 *Bakke*, including *Parents Involved*, including *Gratz*,
3 including both rounds of *Fisher*, standing has been raised in
4 every point and it's routinely been rejected. A 501(c)(3)
5 organization, SFFA, hundreds of members, I don't think that
6 standing, there is even a realistic chance that standing is
7 actually going to be put into issue in any way in this case.

8 Secondly, we cite the First Circuit precedent in
9 our filing about the fact that standing is to be litigated
10 like any other issue and alongside the other issues.
11 Harvard did not file a 12(b)(1) motion which certainly would
12 have been their right if they wanted to front load this
13 issue.

14 We're in discovery so I have that perspective. And
15 in particular I think our concern is with respect to
16 unilateral deposition testimony. You know, if -- the
17 document discovery is going to be exchanged. SFFA was
18 willing to exchange documents with Harvard going back to
19 last spring and Harvard wasn't willing to exchange any
20 documents. Almost every document they've produced in this
21 case has been at the order of the Court.

22 So to the extent that, you know, when we get into
23 the questions as to SFFA's organizational documents, SFFA is
24 prepared to produce those but we really think that the case
25 needs to be set up in a way so that both parties are moving

1 forward. It's not just simply some low hanging fruit from
2 Harvard's side and then everything that they need to file
3 dispositive motions to try to short circuit the case, that
4 is just going to delay the case. That's our concern.

5 We have members who applied to Harvard, were
6 rejected, they're members of this organization. They want a
7 fair chance to compete for admission at Harvard and they're
8 aging out of their window to transfer.

9 The case has been pending for more than a year.
10 It's been almost a year since the Answer was filed. I guess
11 our view is that, you know, the meat of discovery is really
12 going to be how the admissions process works, what role race
13 is playing when they actually get into the meetings, when
14 the readers are doing their evaluations of the applications,
15 we haven't had one page of discovery on that information.
16 We think that discovery does need to move forward and it
17 goes a little bit beyond just the four or five RFPs that
18 Harvard has cherrypicked which are largely, I think "low
19 hanging fruit" is a fair characterization of these
20 documents.

21 There needs to be some real email discovery. We
22 know there are daily reports regarding the makeup of the
23 class during the meeting process that needs to be produced.
24 I think that there is more discovery out there; but, again,
25 you know, the First Circuit says standing is to be litigated

1 along with any other issue. We're happy to litigate that
2 but we don't think that the case should be sequenced and we
3 certainly don't think that the staging motion should take
4 priority over SFFA's --

5 **THE COURT:** I am not going to sequence it.
6 What I am trying to do is do what we can do while *Fisher* is
7 pending. I mean, I take the general principle but this case
8 is positioned a little bit differently because *Fisher* is out
9 there. And it is not even just a First Circuit case, it's a
10 Supreme Court case, right. So, I mean, I am just, I am
11 trying to get as much done as we possibly can while it's
12 pending. And it is not because it is low lying fruit or
13 because I am sequencing it because I know the standing issue
14 is not going to be, or at least I don't have any reason to
15 think the standing issue is going to be impacted by *Fisher*.

16 If I allow discovery on the standing issue, what
17 are you all proposing to do?

18 **MS. ELLSWORTH:** In terms of what discovery to
19 take, Your Honor?

20 **THE COURT:** Yes. Are you looking for just
21 documents and how many depositions and of who?

22 **MS. ELLSWORTH:** So, I think how many
23 depositions will depend a little bit on what the documents
24 reveal about membership and decision making of the
25 membership and decision making of the Boards of Directors.

1 I think we had in our proposal indicated at one point that
2 two or three depositions might suffice. I don't want to
3 bind us to that right now, although we certainly are willing
4 to be reasonable. I know two depositions of Harvard
5 witnesses have gone forward already or one and a half really
6 of the director McGrath and then another former admissions
7 officer.

8 So depending on how many decision makers are
9 implicated and certain of the members, the proposed, the
10 members of SFFA that are proposed applicants, we may need to
11 depose some of them, which we're willing to be reasonable
12 and come up with a proposal for what we would seek to submit
13 to the Court, if that would be useful.

14 **THE COURT:** I can do it two ways. I can give
15 you a limit of three depositions and then you come back or I
16 can take them at their word that they're going to be
17 reasonable and that you come back if you feel like they're
18 not being reasonable, or I can just set another status
19 conference for a month and we can have everybody talk about
20 how unreasonable everybody else is being here in a public
21 forum.

22 **MR. STRAWBRIDGE:** Your Honor, I guess my view
23 is if the Court is really inclined to allow depositions on
24 their side and not on our side, we'd appreciate as much
25 clear guidance as we can. Agreement unfortunately has been

1 difficult to come by in this case.

2 I do just want to make an additional point, and
3 maybe Your Honor's mind is made up, but, you know, I have
4 yet to hear from that side of the table -- and we've been
5 through this several times now -- any articulated way in
6 which the actual scope of the fact discovery of how Harvard
7 uses race is going to be changed by *Fisher*. There is a lot
8 of speculation as to how the legal standard might shift but
9 the way that Harvard actually applies race, the way that it
10 actually takes it into account, and the way it affects
11 individuals or groups of people in the admissions process is
12 just a question of fact and I don't think there is any
13 reason to sort of forestall discovery into that process.

14 **THE COURT:** If the Supreme Court, for example,
15 says race cannot be considered in any way, shape or form,
16 right, that's one case; and if they leave things generally
17 sort of status quo saying that it can be considered under,
18 you know, certain limited circumstances, that is a different
19 case.

20 And I am concerned about letting discovery go
21 forward premised on this case being one of those two things,
22 and I don't know which it would be, and I am sure there is
23 many permutations of it in between so --

24 **MR. STRAWBRIDGE:** I appreciate the concern --

25 **THE COURT:** -- if they say that race is not

1 being considered at all ever, they're going to have to
2 change their admissions process.

3 **MR. STRAWBRIDGE:** In the unlikely event that
4 they say that race cannot be considered at all, then we may
5 be entitled to judgment at that point.

6 I think, if you read the transcript, I think that
7 far and away the most reasonable expectation is going to be
8 a statement about the University of Texas's program and how
9 the University of Texas's program fits within existing
10 precedent. I mean, any case could always alter
11 fundamentally the scope of the law but I think that has to
12 be balanced against the harms to the student members of this
13 organization whose window to transfer is closing.

14 **THE COURT:** It is only another few months.
15 And I am willing to concede right out there that all those
16 people in the Supreme Court, at least most of them, are a
17 lot smarter than I am. I am just not willing to guess about
18 what they're going to do. I really don't know what they are
19 going to do.

20 So, but I do want to use this time, so I am going
21 to let standing discovery go forward. She says she is going
22 to be reasonable. I'll limit you to three depositions. If
23 you need more, come back and ask. If you feel like their
24 three are unreasonable, you come back and let me know. But
25 let's just get, let's get it done while we can.

1 And, you know, I take your point on the RFPs that
2 we've talked about, 16, 18, 27 and 31, being low-lying
3 fruit. Those are the ones that they sort of suggested.
4 They made sense to me. If you have other ones that you
5 think are, that should be included in that group for
6 whatever reason, you can also send me a letter and they can
7 respond and we can review that. I would like to have that
8 be a larger group but, you know, what I didn't do was parse
9 through the discovery RFP by RFP trying to figure out which
10 ones could get done and which ones couldn't. So if you have
11 suggestions about ones you'd like me to add to that list,
12 I'm happy to do that. I think as sort of a bright line,
13 what I am trying to stay away from is the individual
14 applications at this point. So if you have sort of generic,
15 you know, batches of documents, policies, protocols, you
16 know, the same sorts of things that are in these RFPs, I'm
17 certainly willing to add them to the list.

18 **MR. STRAWBRIDGE:** If I may ask, Your Honor, do
19 you have a view with respect to some of the third-party
20 discovery in this case? That was one of the issues that we
21 had raised.

22 **THE COURT:** I am, I -- I thought I had already
23 ordered this but I may not have.

24 In terms of, say, like the alumni interviewers, is
25 that one of the categories you were thinking about?

1 **MR. STRAWBRIDGE:** That's one but there are a
2 number of others.

3 **THE COURT:** Which other categories?

4 **MR. STRAWBRIDGE:** Well, there is certainly
5 potential third-party discovery at the high school level
6 with respect to people who are intimately involved in their
7 students' applications to the Ivy League schools and Harvard
8 in particular. There is also discovery among trade groups,
9 higher education trade groups that, you know, there is some
10 indication that they would have highly relevant information
11 with respect to Harvard's policies as well as general
12 policies and understanding. There are witnesses to the harm
13 who look at everyday students whose hopes to apply to these
14 schools are crushed and are sometimes told explicitly that
15 their race is a factor in their decision making and so that
16 is all fair ground for third-party discovery.

17 **THE COURT:** So sort of consistent with my view
18 that I am not going to get into individual applicants, I am
19 willing to do generalized discovery so, for example, on the
20 alumni interviewers, if I haven't ordered it already, and I
21 thought that I had, sort of the general guidelines of their
22 alumni interviewing program but not the specific individual
23 alumni interviewers. And that's why I am not going to allow
24 high school trade group or witnesses to the harm. I am
25 interested in the broader sort of structural policy program

1 protocol discovery and not getting into individual
2 applications or situations.

3 Ms. Ellsworth.

4 **MS. ELLSWORTH:** I was just going to clarify,
5 Your Honor. You have ordered the general policies and
6 procedures about the alumni program. That's included in the
7 production that we made and are making on a rolling basis.

8 **THE COURT:** That is what I thought. So, I
9 mean, that is where I stand on sort of as a bright line as I
10 can give you now. I am not -- I am holding back, trying to
11 hold back on anything that involves individual applications,
12 individual interviewer, an individual high school guidance
13 counselor. I'm trying to keep this on a broader level until
14 *Fisher* is decided.

15 **MR. STRAWBRIDGE:** And then let me just, maybe
16 this is the application of sort of your more general
17 approach, but does Your Honor have a view on email
18 discovery, for example, for both parties? You said
19 something that we can negotiate or start production on --

20 **THE COURT:** Yes, can you be a little more
21 specific about --

22 **MR. STRAWBRIDGE:** Sure. I mean, the parties
23 obviously have, especially with respect to Harvard's
24 admission policies, a lot of their responses to our RFPs
25 basically say that they're going to produce, you know, ESI

1 so -- and we know that there are particular documents and
2 reports that were circulated via email that are going to be
3 relevant to the case. So I guess the question is, you know,
4 we would obviously appreciate the opportunity to at least
5 start negotiating custodians and the scope of ESI but I
6 think some of that is going to be a big chunk of the
7 relevant document discovery.

8 So if email is on or off for both sides, that's
9 fine, but I think we want --

10 **THE COURT:** Certainly negotiating the scope is
11 on and what -- let me hear what you have to say, you're
12 standing up.

13 **MS. ELLSWORTH:** Sorry.

14 **THE COURT:** No, that's fine.

15 **MS. ELLSWORTH:** I just wanted to be heard
16 briefly.

17 **THE COURT:** That is as polite a way of letting
18 me know that you want to be heard.

19 **MS. ELLSWORTH:** Certainly our position is, I
20 mean, ESI means a variety of different things. There are
21 lots of electronic documents that have been produced and
22 will be produced responsive to the RFPs that we've
23 identified and Your Honor has indicated will order
24 production on.

25 I think specific individual email would be, follow

1 on what I guess we are viewing as on the sort of should be
2 pending *Fisher II* side of the line so that's going to relate
3 to individual applicants or the actual, you know,
4 application process if it goes to -- I fail to see what
5 email discovery could relate to some of the more general
6 structural policies.

7 **THE COURT:** If there is a weekly report that
8 is -- and I have no idea. I am just -- if there is a weekly
9 report that circulates every Monday that says right now we
10 have this many people in, we have this many people out,
11 there is statistical information we have this many spots
12 left, if there is statistical information that isn't, that
13 doesn't focus on individual applications or name individual
14 applicants, that is the kind of information that I would
15 like exchanged now.

16 But, you know, I am in a little bit of a difficult
17 position here because I don't really know what the documents
18 look like but I'm trying to make clear that a statistical or
19 objective report that doesn't name individual students, that
20 is the sort of thing I would like to be having exchanged
21 now.

22 **MS. ELLSWORTH:** There is not to my knowledge a
23 weekly report that comes around on a regular, you know, on
24 sort of a scheduled basis. There certainly are reports that
25 are discussed in the Admissions Office and used that have

1 some statistical information that don't fall into the
2 categories that we had offered or proposed as sort of our
3 fallback position to produce here.

4 So there is not, you know, we can investigate
5 whether there is something that is, in fact, a regular
6 circulation. My knowledge of the facts of the documents is
7 that there is not something that is quite so regular. I'm
8 not saying this report doesn't exist. It's just not
9 something that goes around every Monday morning as Your
10 Honor suggested.

11 **MR. STRAWBRIDGE:** Just, Your Honor, briefly,
12 there is a daily report during the meeting process. I'm
13 going to try to respect the protective order but we know the
14 daily report, at least when the actual admissions meetings
15 are convened, that was the subject of testimony already in
16 this case and that's the kind of thing we're talking about.

17 **THE COURT:** I mean, I don't have it in front
18 of me so just to try to give you some guidance. To the
19 extent that that says we reviewed, you know, Tommy, Sue and
20 Mary, Tommy is in, Mary is out, Sue we're going to defer, I
21 am not going to require them to exchange that sort of
22 information now. But if there is a more general report
23 about we reviewed this many applicants, that leaves this
24 many spots, this is what the current statistical breakdown
25 is or not, by that I mean if they're, you know, I think

1 there is a difference if they're looking at any racial or
2 ethnic or bugle-playing composition of the class week to
3 week versus if they get, like, 80 percent of the class and
4 then look to see where they're deficient. And then -- I
5 think there is a difference in that and I think they are
6 entitled to know which model it is.

7 And if there is a way to do that now, the reports
8 that don't discuss individual student applications and why
9 this one is in and this one is out, I would be inclined to
10 let that sort of report go over now. But if it includes
11 individual student information, I would be inclined to hold
12 it off until after *Fisher*.

13 **MR. STRAWBRIDGE:** That's some suitable
14 guidance. We're happy to submit a letter in very short
15 order with respect to some additional RFPs that we think
16 should be fair game but I think I understand the parameters
17 of the Court's guidance.

18 **MS. ELLSWORTH:** I understand what Your Honor
19 is saying. I'm not sure that there is a document that
20 exists in that way but I understand your guidance and we
21 can --

22 **THE COURT:** If there is not, there is not,
23 right. I really am not privy to the documents. I am just
24 trying to -- I am happy to resolve, you know, this RFP by
25 RFP, document by document, but I feel like if I give you

1 some general guidance about how I am going to come down on
2 these things, you guys are all excellent lawyers and surely
3 you, you know, hopefully you can resolve some of these
4 things without coming back here every other day, although it
5 is always a pleasure to see you.

6 **MS. ELLSWORTH:** Thank you, Your Honor.

7 **THE COURT:** If you saw what the rest of my day
8 looked like, you would know that I am being completely
9 honest.

10 (Laughter.)

11 **MR. STRAWBRIDGE:** We appreciate that, Your
12 Honor.

13 **THE COURT:** So that is what I am inclined to
14 do. If either one of you have more things you can add to
15 the pot, I am happy to consider those, but for the moment --
16 and we will get an order out to try to give you some
17 guidance -- but standing discovery and, if need be, motion
18 practice, the four RFPs we talked about and whatever you can
19 get done in terms of negotiating the parameters of discovery
20 so we can hit the ground running when *Fisher* is decided. I
21 will schedule regular conferences. How often are you
22 thinking or --

23 **MR. STRAWBRIDGE:** I mean, I would suggest that
24 they should -- monthly seems appropriate. If the parties
25 can agree that there is no need for a particular conference,

1 we're happy to notify the Court and move them.

2 **THE COURT:** So we will schedule them monthly
3 and then if you decide it is not necessary, just let us
4 know. Karen, you can start looking ahead for a month.

5 And then, so these two letters which, again, are a
6 little, I guess I could take a second to look at this.

7 (Pause in proceedings.)

8 **THE COURT:** So there is 296 fields that
9 Harvard has not turned over; is that right?

10 **MS. ELLSWORTH:** There is 296 fields that are
11 identified by SFFA in their letter. You know, we would like
12 an opportunity to respond more fully. To the extent Your
13 Honor is interested in adjudicating this by letter, we're
14 happy to submit a letter response in some shorter period of
15 time than the 14-day motion period. But these are -- I
16 don't think we -- Harvard certainly doesn't want to discuss
17 these in a public setting hearing. We'd have to ask that
18 the courtroom be closed if we're going to have a, sort of a
19 field-by-field discussion of this.

20 But I think it probably would be more productive to
21 have some equivalent of briefing on the fields and the basis
22 for withholding certain fields.

23 **THE COURT:** So why don't we go ahead and do
24 that. We will have another status in a month. If we can
25 decide it on the papers, we will. If I want to hear from

1 you, we will do it in a month.

2 But I, you know, I guess -- and, again, I thought I
3 could look at this quickly but I can't, it is not in a
4 format that I can look at it really quickly and know what we
5 are talking about.

6 So if you are talking about fields that, for
7 example, take out the names of the recommenders for a
8 particular student or, you know, that sort of information, I
9 am going to let them hold that back for now. You know, I am
10 going to let them hold back information that specifically --
11 I want the statistical information to go over but I want
12 the, if you are talking about like names of people and how
13 they regard recommendations from one person over another,
14 you know, that kind of stuff I am going to let them hold
15 back but --

16 **MR. STRAWBRIDGE:** Just briefly, Your Honor.
17 That's certainly one category. There is another category
18 that actually has been the subject of public testimony in
19 this case already so I think it is okay to talk about that,
20 that is, there is some applicant-specific information.
21 You're right, one of the categories of information we're
22 seeking is information about potential third-party witnesses
23 so perhaps that falls within what Your Honor is talking
24 about.

25 We also have raised some issues specific to

1 applicants and, I mean, including things like what extra
2 curricular activities they participated in, what honors they
3 won. The names and the street addresses are strictly out of
4 a database. There is material that their expert actually
5 identified as being useful to SFFA that, you know, on that
6 level and obviously relevant to the admissions process. We
7 don't have that at this point.

8 There is more that I could go into except for it's
9 covered by the court --

10 **THE COURT:** I am cognizant of the request not
11 to discuss it here but to the extent you want to comment on
12 it, go ahead.

13 **MS. ELLSWORTH:** We will file a more full
14 response but I would just note that the basis for
15 withholding certain of the fields that are not specific
16 individuals' names are that they do render the applicants
17 identifiable or could render the applicants identifiable so,
18 again, it's a privacy concern for the applicants and
19 students at Harvard.

20 **THE COURT:** Like I said, if it says, you know,
21 No. one tennis player at Newton North High School, I am
22 going to hold off on that; but if it says tennis player, I
23 want that produced, okay. Generally speaking off the top
24 unencumbered by any actual documents.

25 **MS. ELLSWORTH:** We understand. We'll provide

1 a letter that will hopefully educate Your Honor a little bit
2 more on whether that type of line drawing can be done from
3 the information.

4 **THE COURT:** How many fields are there? Like,
5 if you have an individual student applicant, they get a --
6 there is a database that is filled out with all the
7 information for that applicant, how many fields are there
8 for each applicant?

9 **MS. ELLSWORTH:** In the entire database there
10 are about 1600 fields. Not every applicant has every field
11 filled out.

12 **THE COURT:** I don't know if I should be
13 starting to feel better or worse about the fact that I
14 didn't get into Harvard.

15 (Laughter.)

16 **THE COURT:** If there is 1600 fields, I could
17 have been deficient in a lot of them. If there is only 10,
18 I feel like I hopefully would have made the cut.

19 All right. So --

20 (Laughter.)

21 **THE COURT:** So why don't you go ahead and
22 brief that. Let's have it -- how much time do you want? I
23 know if it were a motion you would be entitled to your two
24 weeks. Do you need the two weeks?

25 **MS. ELLSWORTH:** We could certainly do it in

1 one week, Your Honor.

2 **THE COURT:** Why don't we do that. We will
3 take a look at it. Karen, do you have the next date for
4 them?

5 **THE CLERK:** Thursday, February 25th, at eleven
6 a.m.

7 **THE COURT:** Is that school vacation week?

8 **THE CLERK:** No, that is after.

9 **MS. ELLSWORTH:** I had the same question so
10 that's fine.

11 **THE COURT:** Mr. Waxman, you look like you are
12 going to say something.

13 **MR. WAXMAN:** I don't have my electronics so I
14 have no idea about February 25th but I do believe that I
15 don't have an argument on that day, at least that I can
16 recall.

17 **THE COURT:** They don't let you bring your
18 electronics in?

19 **MR. WAXMAN:** They do but, maybe I wasn't
20 prepared. I have it in my briefcase; but, in any event, I
21 think that date is fine.

22 **MR. STRAWBRIDGE:** Your Honor, if I may?

23 **THE COURT:** Of course.

24 **MR. STRAWBRIDGE:** That is fine, we're happy,
25 you know, to do this.

1 I'll note on all the issues that we raised in our
2 letter, we've raised those issues with Harvard going back to
3 December 15th. I don't think that it was a surprise that we
4 were going to file something before the conference. We
5 talked about it last week and let --

6 **THE COURT:** I am not faulting you for the way
7 it was raised.

8 **MR. STRAWBRIDGE:** The one issue, at least one
9 of the issues that we did raise that I don't think requires
10 further briefing, and really shouldn't, because we have a
11 relatively reasonable request for a modest expansion of the
12 protective order so that we're able to actually talk to our
13 client.

14 **MS. ELLSWORTH:** We do want to brief that
15 issue, Your Honor. We don't view it as a modest request in
16 light of the highly confidential nature of the information
17 here and the fact that the protective order was negotiated
18 by both parties so we do intend to address that in the brief
19 we file in one week.

20 **THE COURT:** I will let them have a week. I
21 mean, I am somewhat reluctant to jump into a protective
22 order that was negotiated between two parties. And, you
23 know, you agreed that something is going to be sort of
24 attorneys' eyes only and then you want to give it to your
25 principal non-attorney participants, it does --

1 **MR. STRAWBRIDGE:** Well, I think the scope
2 about the extent to which they're designating materials has
3 certainly caught us off guard.

4 **THE COURT:** I think that is a valid point that
5 you raise. I also, you know, I take from Ms. Ellsworth's
6 response that you're allowed to share the substance of the
7 documents, just not the actual document itself; is that --

8 **MR. STRAWBRIDGE:** No, I don't think that's
9 true at all. I think what she does is say we're not allowed
10 to reveal the existence of the information.

11 **THE COURT:** Is that what you said in your
12 letter, that they could share the substance of the document?

13 **MS. ELLSWORTH:** Yes, Your Honor. The
14 protective order in paragraph five has a provision meant to
15 address the concern that SFFA is raising. Perhaps an
16 interpretation of that provision is the subject of dispute
17 but it certainly, you know, as I said, was negotiated in the
18 protective order we contemplated.

19 Harvard has non-attorney clients as well that need
20 to be advised and, you know, proceeding under a protective
21 order which allows one to advise your client about strategic
22 legal decisions without revealing any protected information
23 so we think that should be sufficient.

24 **THE COURT:** Why don't you put in your response
25 what it is you think they can, the extent to which the

1 protective order allows them to share information with their
2 clients and how and maybe we will have some more common
3 ground than we think.

4 They say you're designating 80 percent of your
5 documents; is that accurate?

6 **MS. ELLSWORTH:** The percentage may well be
7 correct. I mean, the fact of the matter is that what was
8 ordered to be produced is, does, in fact, we believe quite
9 squarely fall within the protective order's terms in terms
10 of either sensitive personal information or the type of
11 trade secret information about how Harvard conducts its
12 admission process, commercially sensitive information that
13 is not appropriate for members of the public and certainly
14 not for future applicants to Harvard to have, to be privy to
15 when other applicants are not.

16 So the scope of our designation has to do with the
17 nature of the discovery as to what they are seeking rather
18 than any over-designation on Harvard's part.

19 **THE COURT:** We will see where we are in a
20 couple of weeks.

21 **MR. STRAWBRIDGE:** And just one follow-up, Your
22 Honor. We will certainly do it in a reasonable time and
23 space but if they're going to brief a full response, we'd
24 like a brief opportunity to submit a reply to respond to
25 whatever they --

1 **THE COURT:** That is fine. I mean, I would
2 like it to be fully briefed for me with a little bit of time
3 to think about it before we meet again.

4 **MR. STRAWBRIDGE:** We can do it in a matter of
5 48 hours after theirs.

6 **THE COURT:** That is fine. I mean, I am always
7 inclined when I get these letters to sort of start working
8 through them without talking to the parties but by the time
9 you take your week and you take your two days we will be
10 close enough to the next status and I am happy to hold off
11 if you both would like to preserve the opportunity to be
12 heard on it orally.

13 **MS. ELLSWORTH:** Thank you, Your Honor.

14 **THE COURT:** I'm happy to do that. And then,
15 so if we are not going to get to it until, for a month, if
16 you want to take a little longer than a week and you want to
17 take a little longer than 48 hours, you know, it is not a
18 firm deadline. We should be ready to go in a month on it.

19 Okay. Anything else?

20 **MS. ELLSWORTH:** Nothing from Harvard, Your
21 Honor.

22 **THE COURT:** Mr. Strawbridge?

23 **MR. STRAWBRIDGE:** Not at this point.

24 **THE COURT:** Okay. Thanks everyone.

25 **VOICES:** Thank you.

1
2 (WHEREUPON, the proceedings were recessed at 10:33
3 a.m.)
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C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

CAROL LYNN SCOTT
Official Court Reporter
John J. Moakley Courthouse
1 Courthouse Way, Suite 7204
Boston, Massachusetts 02210
(617) 330-1377

DATE: February 3, 2016